PUBLIC BANK BHD

v.

ANUAR HONG & ONG

HIGH COURT MALAYA, SHAH ALAM
ZALEHA ZAHARI J
[CIVIL APPEAL NO: MT3-11-55-99]
14 DECEMBER 2004

TORT: *Negligence - Banker and customer - Bank making payment on customer's forged cheques - Whether bank negligent - Whether cheques honoured bona fide in the ordinary course of business - Whether customer in breach of contractual obligation to scrutinise monthly account statements and notify bank of discrepancies or forgery promptly - Whether customer itself negligent for not verifying monthly account statements, monitoring cheque books and keeping them in a safe place, and supervising accounts clerk - Whether customer deemed to have ratified payments made on forged cheques - Whether estopped from relying on forgery committed by its own employee*

BANKING: *Cheque - Forgery - Bank making payment on customer's forged cheques - Whether bank negligent - Whether cheques honoured bona fide in the ordinary course of business - Whether customer in breach of contractual obligation to scrutinise monthly account statements and notify bank of discrepancies or forgery promptly - Whether customer itself negligent for not verifying monthly account statements, monitoring cheque books and keeping them in a safe place, and supervising accounts clerk - Whether customer deemed to have ratified payments made on forged cheques - Whether estopped from relying on forgery committed by its own employee*

The plaintiff/company had two current accounts with the defendant/bank, namely, an office account and a client's account. As it transpired, the plaintiff had filed a writ of summons against the defendant claiming that the latter had wrongfully allowed the encashment of eight cheques amounting to RM4,000 from its office account and another 26 cheques amounting to RM15,000 from its client's account. It was the plaintiff's case that the defendant ought not to have honoured the said cheques as the signature of the defendant's partner ('Hong') on them had been forged by the defendant's accounts clerk. After a full hearing, the magistrate found for the plaintiff and entered judgment in its favour; hence, the instant appeal by the defendant to the High Court.

Held (allowing the defendant's appeal):

[1] The magistrate was correct in holding that the plaintiff had discharged the burden of proving that Hong's signature on the cheques had been forged by his accounts clerk. (p 295 c)

[2] Nevertheless, the plaintiff's action against the defendant must fail for the following reasons: (i) the cheques were honoured by the defendant in the ordinary course of business and in good faith; (ii) in failing to notify the defendant of the forgery promptly, the plaintiff was itself in breach of its contractual obligations under cl. 18 of current-account rules and regulations; and (iii) the plaintiff itself was negligent in failing to: (a) verify its monthly current account statements; (b) monitor its cheque books and keep them in a safe place; and (c) supervise its accounts clerk. (pp 294 f-h & 295 a, c-d)

[3] The plaintiff did not exercise sufficient supervision over its accounts clerk; indeed, it was inadequate to only verify its current account statements once every three months. The plaintiff had thus failed to exercise due care to protect itself from the misconduct of its employees. The plaintiff also had a contractual duty to scrutinise its monthly current account statements and to notify the defendant of any discrepancies or unauthorised cheques of which it became aware (cl. 18). The plaintiff had breached this obligation and must be deemed to have ratified the payments made on the cheques. Hence, it would also be estopped from relying on the forgery committed by its own employee. The defendant was **not** negligent in honouring the cheques. (pp 295 f-h & 296 a-h)

Per curiam:

[1] The bank has an obligation to honour its customer's mandate as regards payment on cheques drawn on the customer's current account. The bank, however, owes a duty of care to the customer to withhold such payment where there is fraud. The customer owes a corresponding duty to not facilitate fraud. In the absence of any express term to the contrary, the customer's duty in relation to forged cheques is limited to exercising due care so as to not facilitate fraud or forgery. (p 295 e-f)

For the defendant/appellant - Cik Vilasini; M/s Allen & Gledhill
For the plaintiff/respondent - Elni Azura; M/s Anuar Hong & Ong

Reported by Gan Peng Chiang

JUDGMENT

Zaleha Zahari J:

The appellant in this case carries out banking business. It has a branch at Damasara Utama. The respondent was a customer of the appellant having the following two current accounts ie,:

(a) Account No. 30792918-25 (hereinafter referred as "the office account"); and

(b) Account No. 30792985-36 (hereinafter referred to as "the client's account").

By writ of summons filed on 4 November 1997 the respondent claimed that between the period of February to May 1997 the appellant had wrongfully allowed the encashment of 8 cheques from its office account amounting to RM4,000 and another 26 cheques from its client's account amounting to RM15,000 the details of which are as follows:

A. The Office Account

	Date	Cheque No.	Amount
1.	4 February 1997	987099	RM500
2.	3 May 1997	987056	RM500
3.	5 May 1997	987055	RM500
4.	12 May 1997	987062	RM500
5.	17 May 1997	987063	RM700
6.	19 May 1997	987064	RM500
7.	23 May 1997	987065	RM400
8.	26 May 1997	987068	RM400

		Total	RM4,000
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B. The Client's Account

	Date	Cheque No.	Amount
1.	18 February 1997	987048	RM 600
2.	27 February 1997	987005	RM 500
3.	4 February 1997	987006	RM 400
4.	10 March 1997	987007	RM 500
5.	14 March 1997	987009	RM 400
6.	17 March 1997	987010	RM 500
7.	19 March 1997	987011	RM 400
8.	20 March 1997	987012	RM 300
9.	24 March 1997	987014	RM 500
10.	25 March 1997	987015	RM 300
11.	26 March 1997	987018	RM 800
12.	27 March 1997	987020	RM 200
13.	2 April 1997	987024	RM 500
14.	2 April 1997	987023	RM 700
15.	3 April 1997	987026	RM 600
16.	5 April 1997	987028	RM 700
17.	7 April 1997	987029	RM 500
18.	9 April 1997	987033	RM 600
19.	12 April 1997	987035	RM 500
20.	12 April 1997	987034	RM 500
21.	14 April 1997	987036	RM 2,200
22.	17 April 1997	987039	RM 500
23.	22 April 1997	987042	RM 700
24.	24 April 1997	987043	RM 400
25.	26 April 1997	987044	RM 700
26.	30 April 1997	987046	RM 500
		Total	RM 15,000

The Magistrate Shah Alam, by order dated 14 October 1999, after a full trial, entered judgement against the appellant in the sum claimed amounting to RM19,000 with interest at 8% per annum from 4 November 1997 to date of realization and costs. Dissatisfied with the said decision the appellant lodged this appeal.

On 1 December 2003 after hearing arguments and perusal of the Appeal Record I allowed the defendant's appeal with costs. My reasons are as follows:

Issues For Determination

From the pleadings and arguments presented the following are the issues for determination:

(a) Whether the magistrate was right on the evidence presented before the court in holding that the respondent had conclusively proved that each and every one of the cheques in issue to be a forgery?

(b) If the answer to the 1st issue is positive, whether in all of the circumstances of this case, the appellant should be held liable in honoring each and every one of the said cheques?

(c) Whether the respondent was under a duty to maintain their cheque books in safe custody?

(d) Whether the respondent had on the facts of this case itself been negligent and therefore estopped from relying on the forged cheques?

(e) Whether on the facts of this case the respondent is deemed to have ratified payments of the cheques in issue by reason of their failure to notify the appellant of any objection to the monthly statements issued by the appellant to the respondent?

The Respondent's Case

The record shows that the respondent's case rests on three witnesses, Lim Bee Ting, one of the respondent's partners (SP1), Hong Kim Piow also a partner in the respondent's firm (SP2) and lastly , one Monolesa bt Ranjan (SP3) who was the respondent's financial clerk at the material time in question.

According to para. 4 of the statement of claim the plaintiff claimed that SP3, had forged the signature of SP2, and that the appellant was wrong in debiting and honoring the respective amounts specified in the forged cheques from their accounts with the appellant.

SP1 (the partner responsible for the affairs of the respondent's firm) was called to give evidence on this point. SP1 testified to discovering that SP3 had forged the signature of SP2 on 34 cheques (exhs. "P4" to "P35") from the

respondent's office and client's account maintained with the Appellant; and that a total sum of RM19,000.00 had been withdrawn from these two accounts without authority.

In cross examination SP1 testified that SP3 commenced work with the respondent's firm sometime in October 1996. SP1 initially used to check the accounts weekly but subsequently reduced it to once every three to four months (p 394 Appeal Record).

SP2 testified that the signature on cheques "P4" to "P35" were not his.

As for the evidence SP3, she confessed to having forged and encashed the cheques in issue. In cross examination SP3 testified that she could not recall the exact dates when she signed the cheques nor could she recall the exact cheque numbers. Be that as it may, SP3 testified that she could identify the cheques concerned from her name on the cheque. In respect of the forgery which she committed, SP3 testified that she was charged for criminal breach of trust, found guilty and convicted, and sentenced to a year's imprisonment.

The Appellant's Case

The appellant denied liability. The appellant's contention was it was incumbent upon the respondent to prove each and every cheque to be a forgery and that on the evidence adduced before the trial court the respondent had failed to discharge the burden that lies upon them.

It was the appellant's case that, even if the court were to hold that respondent had proved the cheques in issue to be forged by SP3, the appellant should not be held liable for the following reasons:

(a) by reason of the fact that the cheques had been honored by the appellant *bona fide* in the normal course of business;

(b) by reason of the fact that the respondent were themselves negligent as they had, contrary to their contractual obligations to the appellant, (ie, cl. 18 of rules and regulations governing the opening and operations of all current accounts with the bank pp 62-64 of the Appeal record) failed to notify the appellant of the forgery committed, having done so only on 11 August 1997;

(c) by reason of the fact that the loss sustained by the respondent had been contributed wholly or in part by their own negligence as particularized below:

(i) by neglecting to check the monthly statements for the months of February to May 1997;

(ii) by failing to supervise and keep their cheque books in a safe place;

(iii) by failing to enquire into the loss of the cheques; and

(iv) by failing to supervise their clerk.

Findings

On the issue of whether the signature of SP2's signature on the cheques in issue were forgeries, the magistrate was satisfied that the respondent had discharged the burden that lies on them.

On this point I hold that based on the evidence of SP1, SP2 and SP3 the learned magistrate was right in holding that the respondent had discharged the burden in proving the cheques in issue to be forged. Be that as it may I am of the view that the magistrate had erred in entering judgment against the respondent for the following reasons.

Whether or not the respondent were themselves in breach of their duty of care owed to the appellant in contract or in tort, is a question of fact having regard to all of the circumstances of the case.

The relationship between a bank and an account holder carries with it the obligation on the part of the bank to honour the customer's mandate as regards payment from the customer's account. The bank owes a duty of care to the customer to withhold payment where there has been fraudulent conduct.

The customer clearly also owes a duty not to facilitate fraud. In the absence of express terms to the contrary the customer's duty in relation to forged cheques is limited to exercising due care in drawing cheque so as not to facilitate fraud or forgery.

I am of the considered opinion that on the facts of the present case the respondent, as employer, appeared to have been rather lax in exercising its supervision in respect of its financial affairs. In my considered opinion to supervise their financial clerk SP3 only once in three months after the initial period was inadequate. The respondent had clearly failed to exercise due care in protecting their own interest from any misconduct of their own employees.

The customer clearly has a contractual duty to notify the bank of any unauthorized cheques of which they became aware.

The appellant's counsel had laid stress on the respondent's failure to comply with the express provisions of the agreement governing the operation of the bank accounts between the parties. (exh. "D 43(A)"]. Clause 3.1 requires the respondent to keep their cheque books in safe custody whilst cl. 18 (p. 64 Appeal Record) requires the respondent to scrutinize the accounts. It was

submitted that had the respondent scrutinized their banking statements as envisaged by this clause the true character of the cheques in issue would have surfaced and the loss averted or minimized.

I am in agreement with the appellant's counsel's submission that where there is an express provision for a customer to verify its accuracy within a specified period, it is incumbent upon a customer to check their bank records and statement and draw the bank's attention to any errors or discrepancy; the ordinary case of arithmetical errors, failure to credit sums to their account, of wrongful albeit innocent debit to an account.

It is a waste of paper and effect if the only obligation of a customer, so to speak, is simply to file such accounts away without taking the trouble to read them and check their accuracy.

The Bank cannot reasonably be required with their own legitimate commercial pressure and concerns to attend to, be more vigilant in the respondent's interest than the respondent himself. A bank is dealing with hundreds or thousands of customers who have their own practices and habits. Bank officers come and go or go on leave and it is extremely onerous to impose on every officer a duty to communicate with every customer before they *bona fide* honour a cheque in the sums represented by the cheques in issue in this case. Notification of any error must be seen as being not only for the protection of the bank, but also for the protection of the customer.

By reason of the respondent's failure to notify the bank in writing within the time prescribed of 14 days pursuant to cl. 18, the respondent is accordingly deemed to have accepted such entries made up to the date of last entry, in the statement as "correct, binding, final and conclusive and thereby adopts all cheques drawn thereon".

In this situation I am in agreement with the submission of the appellant's counsel that the respondent is to be estopped from relying on the forgery committed by their own employee and that they are deemed to have ratified the same.

To sum up I hold:

(a) that the respondent had breached their contractual duty to prevent fraud;

(b) that it was the respondent's own carelessness which caused their loss; and

(c) that the appellant was not negligent in honoring the said cheques

The appeal was accordingly allowed with costs.